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Law as Communitarian Virtue Ethics

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INTRODUCTION

This essay outlines a way of thinking about law analogous to the approach taken by virtue ethics to moral and ethical theory. I do not mean that virtue ethics *per se* should be applied as a tool within the law—an endeavor that I think is destined for mixed success. Rather, I suggest that the governance and regulation of a community can and should be thought about in ways akin to the ways in which virtue ethics looks at the governance and regulation of an individual life. Such an approach would seek out a third, interconnected way, alongside the dominant paradigms of utilitarian cost/benefit analysis (including law and economics) and deontological or normative analysis (including rights-based approaches).

Virtue ethics in moral theory rejects the Kantian emphasis on first principles, as well as the utilitarian focus on preference satisfaction. Instead, it recalls an older tradition which suggests that what makes for a good and fulfilling individual life is not so much getting what you want, or even living according to certain right rules. Instead, what conduces to happiness—what happiness perhaps even *consists in*—is being the right kind of person. What matters is character. Communitarian virtue ethics ("CVE") would call for a similar approach to community life. In addition to asking what a particular rule or practice will accomplish, and whether it is right or wrong, communitarian virtue ethics would ask a third sort of question. What kind of people will it help us to become?

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The term "virtue" in this context, as will perhaps be evident, does not refer merely to general "goodness." It refers instead to particular character traits thought to be worthy of respect or emulation. Indeed, virtue ethics might more accurately be termed "admirable character trait ethics" or something along those lines. The virtues, on this account, are more specific traits like courage, generosity, wisdom, or temperance. Often, they are *much* more specific traits: the toughness and courage in battle valued by the Spartans, the charity and selflessness emblematic of Mother Theresa, the patient and articulate wisdom of Lincoln, or the even-handed detachment one might look for in the ideal judge. The virtues are particular ways of being to which we aspire, about which we dispute, and through which we define ourselves. Applied to an individual life, virtue ethics calls upon us each to ask ourselves a series of questions: Which traits do you find admirable? Which do you want to find or construct in yourself? Which ways of being will allow you to lead a kind of life that you desire and will find both satisfying and worthy of respect? And, finally, what will it take to build or locate those traits in yourself—to make yourself the kind of person you can admire? CVE would encourage the law to provide a forum for us to ask the same sorts of questions of ourselves as a community.

An alternative way to state the thesis is to say that law, understood not primarily as a body of rules but rather as an ongoing conversation, can serve as a valuable and perhaps irreplaceable arena for the construction and articulation of community identity. One of the functions performed by law, and which might be performed more effectively and beneficially, is to provide a context and an arena for an ongoing conversation about what sort of a community we are and want to be.

This is a potentially useful and sensible way to think about law for at least four reasons. First, it has explanatory value. Many high profile and contentious areas of law and politics make more sense once it is recognized that debates within them often serve as proxies for competing visions of public character and community identity. Second, CVE sheds light on the moral and ethical theory out of which it grows. In particular, applying the insights of virtue ethics to the community provides a way of thinking about the source and origin of the virtues to which people aspire.

Third, and closely connected, CVE is worth pursuing because it provides a way of thinking about a problem of long-standing and enduring theoretical interest. What is the relationship between character in an individual and character in (or the character of) a political community? That problem is at the heart of Plato's *Republic*, and Aristotle's *Politics,* and ought to be, though so far has not been, at the center of thinking about both virtue ethics and law. The fourth and in my view most important justification for the approach outlined in this essay is that it addresses directly the thing which law and politics arguably ought to care about most, but which is largely ignored by the great bulk of contemporary scholarship—human happiness.

In this final sense, CVE might be seen as an alternative to law and economics. Where law and economics begins with the often unspoken and essentially undefended assumption that human happiness will be advanced through the satisfaction of preferences and/or marginal increases in objective or material well-being, variously defined and measured, CVE proceeds from an alternative assumption, drawn from the Platonic and Aristotelean tradition, that happiness emerges instead from certain ways of being.

My goal here is to sketch out what it might mean to look at law from this perspective, and to defend my claim that it is a good idea to do so. To those ends, I first describe briefly the theory of virtue ethics, then move quickly to what communitarian virtue ethics might look like. I then attempt to answer a series of questions about the theory as well as respond to potential objections to it. What would CVE arguments look or sound like if made in a court or a legislature? Why should lawyers learn to make, and legal processes be open to, these sorts of arguments? Would these be legitimate and valid "legal" arguments, entitled to weight in legal decision-making? What role can or should law play in the construction or articulation of community character? What are the implications of CVE for legal scholarship? Finally, I acknowledge that I have not even tried to answer, but have merely posed and asked that law be willing to address, the deeper and ultimate question raised by the theory. Given that character—rather than preference satisfaction, for example—is what we ought to pursue, what sort of character should we strive to articulate and construct?

II

What is virtue ethics? It is a way of thinking about how we ought to live our lives. It differs from alternative approaches to ethics and morality not only in its methods, but more fundamentally in its goals and operating assumptions. Unlike deontological or consequentialist approaches, both of which emphasize ideas of duty and obligation—though specified in different and sometimes conflicting ways—virtue ethics focuses on human thriving. The aim is neither to describe or categorize various actions as right or wrong, nor to provide a set of rules against which actions can be so described or evaluated. Rather, the goal of virtue ethics is to identify ways of being which will conduce to or even constitute human excellence and happiness. The focus is on character, rather than primarily on conduct, although, critically, character is understood to be both revealed by and constituted through action. Virtue ethics asks us to think carefully about not just what we accomplish, and not just whether our actions are right or wrong, but more essentially on what sort of people we are, and on what that can mean for the quality of our lives.

This way of thinking has its origins in the work of the ancient Greeks—particularly Plato, Aristotle, and the Stoics.[1] Their approach to ethics, however, was so different from the currently regnant modes of ethical theorizing—orthogonal, really—that they can be difficult to read and appreciate now. It is hard to pin down the ancients on the questions that to us seem essential to ethics. What, exactly, is Plato's view on the nature and source of moral duty? In Aristotle's view, are the virtues he elucidates merely conventional—the traits of a good and successful Athenian

1. The essential sources for classical virtue ethics are the *dialogues of Plato* (primarily the *Republic*, but also the *Charmides* (on temperance), the *Crito* (on justice), the *Laches* (on courage), the *Euthyphro* (on piety and justice), the *Protagoras* (on virtue and how it is acquired), the *Phaedo* (describing the execution of Socrates), and the *Apology*); and Aristotle's *Nicomachean Ethics* (along with, to a lesser extent, his *Politics*, *Eudemian Ethics*, and *Rhetoric*). *See, e.g.*, PLATO, THE COLLECTED DIALOGUES OF PLATO (Edith Hamilton & Huntington Cairns eds., 1961); ARISTOTLE, THE BASIC WORKS OF ARISTOTLE (Richard McKeon ed., 1941). An excellent brief introduction to classical virtue ethics and its sources is provided in RAYMOND J. DEVERETTE, INTRODUCTION TO VIRTUE ETHICS (2002).

gentleman? Or are they somehow transcendent obligations? Our inability to find clear answers to these questions can give rise to a sense that the work of the ancients is somehow obscure and difficult, or perhaps irrelevant to sophisticated modern thinking. It is none of those things. They were simply asking different questions—questions that we can and I think do care about as well. When they wrote about ethics, they were not focusing on the sorts of questions we are tempted to foist on them. They were not asking what sorts of actions are obligatory or prohibited by some transcendent moral law. Instead, they were talking about what makes for a full and satisfying and excellent human life.

A modern revival of virtue ethics was kicked off by Elizabeth Anscombe with her 1958 article, *Modern Moral Philosophy*,[2] in which she criticized the regnant focus on deontologically-derived obligation and suggested instead that moral theory focus on ideas of virtue and human flourishing, as did classical ethical theory.[3] This suggestion has been taken up or responded to in various ways by a wide range of scholars, employing a wide range of approaches. The leading figures have perhaps been Bernard Williams,[4] Phillipa Foote,[5] Michael Slote,[6] Alasdair MacIntyre,[7] John McDowell,[8] and Rosalind Hursthouse,[9] among others. With few exceptions, this work has not focused on the role of community in the construction of character,[10] let alone on the connection between character

2. *See* G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHILOSOPHY 1 (1958).

3. *See generally id.*

4. *See, e.g.*, BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY (1985).

5. *See, e.g.*, PHILLIPA FOOT, VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY (1978).

6. *See, e.g.*, Michael Slote, *Agent-Based Virtue Ethics*, *in* 20 MIDWEST STUDIES IN PHILOSOPHY (Peter A. French et al. eds., 1996).

7. *See, e.g.*, ALISDAIR MACINTYRE, AFTER VIRTUE (2d ed., 1985).

8. *See, e.g.*, John McDowell, *Virtue and Reason*, 62 MONIST 331 (1979).

9. *See, e.g.*, Rosalind Hursthouse, ON VIRTUE ETHICS (1999).

10. A significant exception is Lawrence Blum, *Community and Virtue*, *in* HOW SHOULD ONE LIVE? ESSAYS ON THE VIRTUES (Roger Crisp ed., 231 1996) (not discussing law or politics, but arguing that community, variously understood,

and law.[11] This body of work is too diverse to summarize, but a common thread—a particular emphasis—is evident throughout the literature. The emphasis is less on duty and obligation than on excellence and flourishing—less on what we should do to be "right" than on how we should be to be happy.[12]

Virtue ethics, however, need not, and indeed should not, be understood as essentially a branch of academic moral philosophy, or as something arcane or inherently technical. It is better understood as simply a reflection of one of the ways in which thoughtful people go about our lives, by thinking and talking about what kind of people we want to be. We look to and emulate people we admire, and strive to find and or create in ourselves the things we admire in them—things like kindness, courage, temperance, wisdom or any number of more specific and contingent traits we find estimable. At the same time, we look to some with pity, contempt, even disgust, and strive not to see in ourselves the traits which produce those reactions—traits such as cruelty, cowardice, gluttony, or ignorance. This conversation does not take the form, generally, of the refined parsing of virtues and their meanings. It is instead the daily stuff of human interaction—inherent in the stories we tell at the barber shop, the heroes we cheer in motion pictures and on sports fields, the gossip we whisper at the water cooler or over the back fence. That is virtue ethics.

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can not only teach and sustain virtues, but can also provide the specific content of virtues and confer value on them.)

11. As a result, it has been suggested that there is a missing communitarian aspect to virtue ethics. *See, e.g.*, VIRTUE ETHICS: A CRITICAL READER, (Daniel Statman ed., 1997) ("If [virtue ethics] and communitarianism stem form the similar complaints about the basic assumptions of [deontological ethics], communitarianism might turn out to be the political aspect of [virtue ethics]. This whole issue concerning [virtue ethics] and political theory, however, has only just started to be explored.")

12. Helpful collections of recent work on virtue ethics include: VIRTUE ETHICS (Stephen L. Darwall ed. 2003); VIRTUE ETHICS (Roger Crisp & Michael Slote eds., 1997); HOW SHOULD ONE LIVE? ESSAYS ON THE VIRTUES (Roger Crisp ed., 1996); VIRTUE ETHICS: A CRITICAL READER (Daniel Statman ed., 1997).

III

What is communitarian virtue ethics? What would it mean to allow or encourage this sort of conversation to play a larger and more important role in our legal discourse? It would not mean adding new or strange considerations to legal debates. Nor would it mean asking people to think or argue in refined or abstract ways about legal issues—by, for example "applying" virtue ethics to law. Instead, it would simply mean making space in public and legal argumentation for the sorts of considerations which I suggest already and appropriately, if implicitly, inform our thinking. This way of thinking and talking about the law is particularly necessary and appropriate in regards to high profile areas of law that are connected in people's minds to large visions of cultural identity. Communitarian virtue ethics would mean, above all, enabling and encouraging participants in the legal and political process to speak and argue about what the law says about who we are, and what it can help us become.

There have been at least two recent efforts by prominent legal academics to apply virtue ethics to law. It may be helpful to outline the central difference between my approach and those. Kyron Huigens has suggested that virtue ethics might provide a way of thinking about questions of criminal responsibility.[13] It remains unclear, however, whether virtue ethics is capable of providing the sort of predictability and consistency arguably called for in the context of criminal law—or whether it gets to the heart of our reasons and justifications for affixing criminal responsibility. Heidi Feldman has suggested that virtue ethics provides a way of thinking about the negligence standard and the role of the jury in tort cases.[14] Her effort is, I think, more successful. As both a descriptive and normative matter, it is helpful to see tort juries as asking and answering questions not just about conduct but about the sort of character—reasonable, prudent, careful—revealed by that conduct. However, both Huigens' and

13. *See generally* Kyron Huigens, *Virtue and Criminal Negligence*, 1 BUFF. CRIM. L. REV. 431 (1998). *See also* Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423, 1425 (1995).

14. Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431 (2000).

Feldman's use of virtue ethics differ fundamentally from my own. The fundamental difference is that in my view, virtue ethics is better suited to introspection than judgment—more useful in guiding one's own behavior than in evaluating that of others, since evaluations of others is essentially instrumental to the construction of one's own character and identity. For that reason, I suggest that whatever part virtue ethics might play in judging others, its best and essential function ought to be to help us think about ourselves.

In what legal or political contexts would CVE be most applicable? What sorts of arguments would it allow or encourage? As a rule, CVE would be most useful in high profile areas of law, where rules and institutions and practices are most closely intertwined with cultural and historical community identity. Concrete examples will give some sense of the context, range, and potential applicability of this approach. These examples are framed at what might seem like a preposterous level of generality. *Mea culpa.* I fully recognize the difficulty of speaking generally about a theory whose central mandate is a form of specificity; and I have elsewhere elaborated several more concrete examples at some length, some of which I will return to below.[15] Here, however, my aim is to construct or describe a theoretical framework—communitarian virtue ethics—for that and further elaboration. To that end, breadth is at the outset more important than specificity.

Begin with the First Amendment. It seems safe to say that American law places a higher value on free speech than does the law of most other nations around the world. Why so? One answer may be that we simply weigh the costs

15. *See generally* Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258 (2003) [hereinafter Clark, *Confrontation Clause*] (arguing that the Confrontation Clause of the Sixth Amendment may best be understood as calling for a particular form of responsibility and courage in the prosecution of criminal defendants); Sherman J. Clark, *The Character of Direct Democracy*, 13 J. CONTEMP. LEGAL ISSUES 341 (2004) [hereinafter Clark, *Direct Democracy*] (arguing that the initiative, rather than providing an education in citizenship, may entrench a public character of selfishness and irresponsibility); Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381 (1999) [herinafter Clark, *Convictions*] (arguing that the criminal trial jury embodies and demands a similar form of responsibility-taking in the act of judgment).

and benefits of free expression differently than do other communities. But that is only part of the story, and indeed begs the question of why. Another response would be the obvious one—that protection of free expression is mandated by our Constitution. Again, however, the question is why that is the case, and why have we interpreted that mandate as we have? The answer, certainly, lies not just in the way we balance costs and benefits, and not just in the text of our founding documents, but in our history, our culture, our sense of who we are as a people.

One way to acknowledge this reality would be to say that the First Amendment plays an important symbolic role in American life. I hesitate to embrace this description only because the term "symbolic" seems inevitably to imply or invite the addition of the term "merely," as if what really matters about the First Amendment, and law generally, is its pragmatic consequences and/or its fidelity to some set of normative principles, here constitutional principles—next to which concerns about the role played by free speech in the American self-conception are somehow illegitimate or trivial—"merely symbolic." This perspective recalls those who would say that marriage is "just a piece of paper." Indeed it is. It is a "piece of paper"—a symbol, if you will—with history and meaning, and which plays an important role in the way many people understand themselves and their lives.

Or consider guns. If there is an area where American law and culture is more out of line with the rest of the world than in its extreme protection of free speech, it is in our protection of gun ownership by individuals. Why is that? And why are debates over gun control so contentious? Again, it begs the question to point to the text of the Second Amendment, or to say that we, or many of us, "value" gun ownership more highly than do other communities. What drives support for gun rights is not just an ambiguous constitutional provision, and not just, if at all, an evaluation of the relative costs and benefits. As in the case of free expression, it is instead a sense of the role this issue plays in many people's conception of community. The right to own a gun is for many inexorably connected to a deep if vaguely defined vision of cultural identity—a vision which includes things such as fathers and sons hunting together in the fall, a history and self-conception of self-reliance, and a sense of personal freedom.

Now, it is certainly possible to argue that this vision is misinformed, or even silly—that guns should not play such a large role in anyone's self-conception or sense of community, or that such considerations should be given little weight in an arena where real and severe and measurable consequences for public safety hang in the balance. I suggest, and will argue below, that it is not at all silly—that it makes perfect sense for people to care as much about who they are as about how safe they are. The preliminary point, however, is simply that we may not be able to understand the intransigence of resistance to gun control without recognizing the way in which guns and their regulation are seen by many as saying something important if not well-defined about themselves and their lives. This much at least should be evident to anyone who has talked with gun owners, and has in fact been empirically demonstrated.[16] CVE provides a framework for thinking and talking about those concerns.

Environmental regulation is another context which seems to call out for recognition of the role played by law in the articulation of public character and identity. Why are we so happy to learn that the bald eagle is no longer on the brink of extinction? Why have people worked so hard and against so much opposition to reintroduce wolves to Yellowstone National Park? Why would it likely bother us more to see the demise of the grizzly bear than to see the extinction of the arroyo toad? More fundamentally, what is the nature and source of our obligation to preserve or protect the environment? It is possible to give either consequentialist or deontological answers to these sorts of questions; but it is evident that more is going on. One reason we do not want to be responsible for the death of the last grizzly bear is, understandably and appropriately, because of what it would say about us. Perhaps we do not want to evince the arrogance and hubris that would be displayed by the unnecessary destruction of these creatures. Perhaps we would prefer to see ourselves as stewards, or somehow in unity with our natural world.

I am in no position to say what the wolf or grizzly bear mean to us as a people, or what our relationship with

16. Dan Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun Risk Perceptions*, 151 U. PA. L. REV. 1291 (2003).

nature should be. But if those things matter to people—and it seems safe to say they do—we need find some way, some place, in which to talk about them. More to the point, if one of the things that really matters to people about the regulation and protection of the environment is what it will say about us to treat our natural world in various ways, then the law ought to recognize that. A central premise of CVE, further defended below, is that we ought to make space in our legal discourse for what matters to people, rather than forcing people to put their real concerns aside and argue in ways that we find easier to deal with. If the things people care about turn out to be difficult to express, as real things often are, we ought to help people find a language for their expression.

IV

Why so? Why should we allow these sorts of vague and uncertain arguments a place in our legal discourse? Perhaps instead we should encourage or require people to set aside these sorts of inchoate symbolic concerns and focus instead on either fidelity to authority, variously understood, or on the real and measurable consequences of law. Begin with lawyers—the folks who do much of the arguing. Why should we learn to talk about character with the same skill and energy as we talk about consequences and principles?

The first reason lawyers should learn to make these sorts of arguments is straightforward, and is implicit in what has already been said. Lawyers need to persuade; and persuasion requires speaking to those things that matter to people. I have made this point elsewhere,[17] and will not belabor it here, but the key to persuasion is not to make the best or most clever arguments in the abstract. Instead, what persuades—what actually reaches people—is the ability to make or find space in their worldview for the outcomes or understandings one would advocate. This means responding not solely or even primarily to the explicit arguments people make, which will be limited and

17. *See generally* Sherman J. Clark, *The Character of Persuasion*, 1 AVE MARIA L. REV. 61 (2003) [hereinafter *The Character of Persuasion*]; Sherman J. Clark, *Literate Lawyering: An Essay on Imagination and Persuasion*, 30 RUTGERS L.J. 575 (1999).

constrained by what they have been taught is acceptable and appropriate in a given context, but also responding to the often unspoken concerns and meanings that animate and give rise to their opinions and judgments. So, if people—judges, jurors, fellow legislators, voters—care as much about what a law says about them as what it does for them, lawyers need to find ways of speaking to that.

Guns again provide perhaps the clearest example, though far from the only one. This is the central point of Kahan and Braman's excellent recent article.[18] Though I neither embrace nor share their approach in every particular, their work supports my essential claim, and will allow me to clarify and distinguish my own position. In fact, their own opening summary of their findings is worth quoting at some length:

> [W]e demonstrate that individuals' positions on gun control derive from their cultural worldviews: individuals of an egalitarian or solidaristic orientation tend to support gun control; those of a hierarchical or individualist orientation to oppose it . . . . The role of culture in determining attitudes toward guns suggests that empirical analyses of the effect of gun control on violent crime are unlikely to have much impact . . . . Rather than focusing on quantifying the impact of gun control laws on crime, then, academics and others who want to contribute to resolving the gun debate should dedicate themselves to constructing a new expressive idiom that will allow citizens to debate the cultural issues that divide them in an open and constructive way.[19]

The essential point is straightforward. In this arena at least, people seem to care more about meaning and identity, albeit not often clearly or explicitly articulated, than they do about risks and consequences, however well or thoroughly documented. If, therefore, lawyers and politicians hope to be persuasive in this context, they will need to find ways of talking about or at least dealing with meaning and identity. If it is true that people's views are deeply connected to their sense of self and community, advocates on either side can argue until they are blue in the face about the practical consequences or risks of guns and gun

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18. *See* Kahan & Braman, *supra* note 16.

19. *Id.* at 1291-92.

control without so much as a hope of actually reaching anyone or changing anyone's view.

It is worth noting, however, the primary way in which Kahan and Braman's approach differs from that which I advocate under the heading of communitarian virtue ethics. One of the aims of the genus of cultural theory in which they are working is to categorize, measure, and attempt to predict how people of various cultural stripes will evaluate certain sorts of risks. To that end, it is necessary to make use of broad typologies—dividing people's worldviews into "egalitarian or solidaristic" as opposed to "hierarchical or individualistic," for example. Those categories—their viability, their definition, the coding of people into one category or another, etc.—are the source of much debate among cultural theorists and their critics. But those debates need not detain us here, because the project of CVE differs from that of empirical cultural theory in the same way the lawyer's goal differs from that of the social scientist.

The lawyer is most often faced with a particular person or set of people who need to be reached or persuaded, whether it be a judge, a jury, or fellow members of the legislature. The aim is to hear and understand those particular people as well as possible, which requires above all that one see the issue and the world as the other sees it. This is a profoundly difficult and human skill—rooted in experience, empathy, reading, openness, intelligence, and a willingness to enter into the particular worldviews of others. In this effort, it is neither necessary nor necessarily helpful to perform a categorical two-step—first coding the person one would persuade as this cultural type or the other, then employing the arguments appropriate to that type.

It is remarkable—a testament to the power of meaning over consequences—that even at the low resolution provided by broad cultural categories, empirical research can say something about what sorts of arguments will persuade particular people. And lawyers should take to heart the suggestions made thereby about what sorts of arguments to employ in various contexts. But a thoughtful lawyer needs to talk to a particular people. That means not necessarily categorizing them, but rather looking them in the eye, hearing them, understanding what really moves

and concerns them—even if they themselves are often unable to articulate those concerns well or at all.

When we do this, when we make a real effort to enter into the worldviews of others, what we are likely to find is that what Kahan and Braman have demonstrated empirically in the context of guns is almost certainly true for a broad range of issues. Talk with people about freedom of speech, or environmental protection. Talk with them about affirmative action, or abortion, or gay rights, or high profile criminal trials, or constitutional rights. What drives and animates people's views is not just their evaluation of the practical costs and benefits, and not just their abstract moral principles. What matters to them as much will be a complicated and messy and difficult to navigate confluence of meaning, culture, and identity.

From there, the choice is ours. Do we want to argue about the things we think ought to matter to people, consoling ourselves as best we can by saying that those we inevitably fail to persuade are being irrational or intransigent? Or, do we want to reach people? If so, we may need on occasion to lay aside the comforting water-tightness of our empirical demonstrations and the appealing order of our normative systems. We may need to find a way to talk to people about what the law means to them.

V

Granted that lawyers in an effort to persuade might want to learn how to appeal to various visions of individual or public character, why should the law or legal institutions allow us to do that? Why not preclude or discourage such arguments as out of bounds or irrelevant?

The first reason legal processes should be open to arguments about community character and identity parallels the reason lawyers should learn to make those arguments. Arguably, in a democratic society, law and government ought to respond to what people care about. If what they care about, what they want to try to construct or articulate through their law, is who they are, then we ought to make our processes open to those concerns.

But that argument is insufficient. First of all, it implicitly presumes that people's concerns are exogenous—that law simply responds to what people care about. In fact,

law helps construct as well as respond to peoples perspectives and concerns. Which means that it is an evasion to say that the law should be fully open to certain kinds of arguments simply because those are the sorts of arguments people want to make. If character-based arguments were harmful, irrelevant, or destructive of democratic institutions, we might want to discourage them even if they would reflect people's current desires or opinions. If, on the other hand, we believe that character-based arguments and concerns ought to be a part of legal and political discourse, we should perhaps encourage and facilitate them even if the constraints so far implicitly placed on public argumentation have produced a situation in which people do not (yet) realize that character is what they really want to talk about.

So there is no ducking the question. Should we encourage these sorts of arguments? Here, I will to put on the table the assumption at the heart of virtue ethics—the assumption on which the normative force, although not the descriptive force, of the theory of communitarian virtue ethics turns. The assumption is this: human happiness depends as much on what kind of person you are as on whether what you get what you want, or whether your life is lived consistently with some set of first principles. To some, this assumption will be so obviously true as to require no evidence. For others, no proof will suffice. For purposes of this essay, it will go essentially undefended—a contingent assumption, as it were. If you accept it, what follows? But undefended need not mean undescribed. We can at least clarify the role played by one's view of what constitutes happiness in thinking about the appropriate place for character-based argumentation in law and politics.

The starting point for CVE would be this: the central aim of law and politics ought to be the happiness of the people governed thereby. By happiness, I mean not just short-term pleasure or enjoyment, but rather lasting, satisfying, meaningful, praise-worthy fulfillment in their lives. I mean flourishing, living well—what the Greeks called eudaimonia. This idea—this rich view of happiness—is of course not self-defining. In some sense, in fact, the term is a place-holder for all of the things we believe make for a rich and admirable life. It is, in the straightforward sense meant by Aristotle, the name we have given to the

human flourishing which we admire, and to which we aspire—to the lives we would emulate.

Describing our goal as happiness, thus broadly defined, is not mere question-begging. Although we cannot pin it down with precision, we have some sense of it's components, and at least a decent intuition as to what it might be like—an intuition which investigation and thought can further inform. Virtue ethics, like life, is best practiced by those who, following Aristotle, refuse either to sanctify or ignore the common sense and intuition built over time through experience. And even given our highly general definition of happiness, we can certainly say some things about what it is not. It is not the satiation of a glutton, or the grinning contentment of an idiot. We neither admire these men nor aspire to their condition. Roughly speaking, happiness is the moral, spiritual, intellectual equivalent of good health. It is the kind of thing you mean when you wish a young couple happiness in their marriage. And our inability at the outset to reduce it beyond that to a single component, or to define it with precision, should not prevent us from pursuing it. By seeking happiness without having nailed it down, we are not begging the question; we are asking it.

The question is whether we can craft or find ways of being which will give us the praiseworthy, enduring happiness we desire. This is what we ought to try and make possible for our citizens. This is what our philosophy and political theory ought to try and define and articulate. It is what our scholarship ought to try and help us achieve through our law and politics. But our legal scholarship does not do that. Instead, legal scholarship mirrors moral theory. There are normative strains, which focus on legal or political first principles, including democratic legitimacy and individual rights. And, predominantly, there are utilitarian approaches, which seek to weigh costs and benefits in various ways. Neither of these is wrong, indeed both are necessary. But even taken together, they are incomplete. The braid is missing a crucial strand.

The near absence of this strand is due, I think, to the pervasive influence of one overriding, intuitively appealing, but ultimately untenable assumption. The assumption is that making people marginally richer, healthier, or safer—in short, giving them more of what they want—will make them happier. Unfortunately, there is little or no evidence supporting this assumption. On the contrary, if there is one

lesson to be learned from millennia of philosophic and religious thought, and decades of social science, it is this: more stuff will not make you more happy. There is no need to take the extreme or perverse position that material well-being or preference satisfaction are irrelevant to happiness. I will grant, with Aristotle, that it is hard to be happy if you are in desperate poverty or in constant pain. So, all things being equal, we should pursue policies that conduce to wealth and health, and in particular, those policies which address the needs of those worse off among us. But no one has ever made a convincing argument that the way to make a community happier as a whole is to figure out how to make its already-fairly-well-off citizens a little more so.

This makes it reasonable to entertain and consider the implications of the alternative hypothesis—albeit tentative and unprovable—with both a long pedigree and a certain amount of intuitive appeal. Perhaps what makes a person happy is not being a little richer or fitter or safer. Instead, what makes for lasting happiness is being the right kind of person. At this point, I need not and probably should not specify a view as to what kind of person one ought to be in order to be happy in these ways. My initial claim does not depend on one accepting a particular view of what sort of character will conduce to or constitute happiness, although that is certainly a central question *raised by* this approach. The assumption is simply that what matters is not just whether we get what we want, and not just whether we do what is right, but also what kind of people we are.

This point is crucial, and bears emphasis. It is arguably not possible to avoid making some sort of untested and perhaps untestable assumptions about human happiness. Current legal and policy thinking certainly does. In particular, the entire edifice of law and economics depends upon the underlying assumption that satisfying preferences, or making people marginally richer, safer, etc., will make them happier—will lead to well-being. I am being intentionally vague here about the assumption or assumptions underlying law and economics, because there are an infinite number of ways it or they might be specified. But some such assumption is inarguably at work. Put differently, either law and economics depends upon some version of that assumption, or it is an utter waste of time. We do not have an army of legal academics trying to figure out how to make people marginally lighter in complexion.

We do not have an army of legal academics trying to figure out how to make people marginally better at playing video games. Why not? Because it would be silly and pointless. And it would be silly and pointless because there is no underlying assumption that making people lighter in complexion or better at video games will conduce to their well-being in any meaningful way. So, if it is objected that the crucial assumption of virtue ethics—that character is the route to well-being—is unproven, consider the alternative. It is at least as plausible, indeed vastly more so, if human experience, philosophy, religion, and social science are any guide, than is the contrary assumption on which we seem so heavily now to rely. At the very least, character is worth considering and pursuing alongside the consequentialist aims for which we now so vigorously strive, and over which so much academic ink is spilled.

If so, if character is as likely an avenue to well-being as are consequences and principles, and if a central aim of law and politics is or ought to be the well-being of the people governed thereby, then perhaps law ought to make room for a conversation about public character, just as it makes room for talk of measurable consequences and normative principles.

VI

But why should *law* play this role? Even if one accepts the claim that these things are worth talking about—that character matters—is law the right arena for its development and articulation? Given how much is at stake in the high profile contexts in which this approach would be most applicable—real and measurable consequences for public health, safety, and prosperity, for example—perhaps we should find other ways and places to talk about who we want to be, rather than allow these symbolic or expressive concerns to pervade our legal and policy decision-making. First of all, it bears repeating that it is a mistake to assume that character is less essential—less "real"—than health or safety or prosperity. However, it is still worth asking whether there are other vehicles for the construction of character which might relieve law of the need to play this role.

Certainly, law is not the only avenue through which we might construct and articulate public identity and

character. There is art, including film and television. There is also public ceremony—occasions of pure and sometimes powerful symbolic importance, such as presidential inaugurations and Fourth of July parades. However, depending on one's account of character formation, law may be a more essential vehicle than is at first evident—perhaps even an indispensable one.

On Aristotle's account, for example, character is formed essentially through conduct.[20] If you want to be brave, the main thing you need to do is not so much study the virtue of courage, in an effort to "figure out" how to be courageous.[21] You need to do some of that, of course; but the main thing you need to do is to find occasions on which to be brave.[22] It may help to tell yourself that you are brave, but that alone will not suffice, if Aristotle has it right. Courage is built through the doing of courageous acts. Start small, if necessary—by facing the neighbor's dog who has you frightened, or by testing yourself against whatever it is that gives you fear. Fake it, at first, if necessary—hide or work through your fear—but do it, regularly and intentionally. Eventually, it will get good to you; and eventually become part of who you are. Character and action are on this account in this way an interconnected cycle, tied together by aspiration.

If this Arsitotelean account of character formation is at all correct—and it seems safe to say it is, at least to some extent—what are the implications for the development of community, as opposed to individual, character and identity? The upshot is that we need to find places where we act *as a community*, and through those actions both demonstrate and develop the public virtues to which we aspire. It is possible to imagine public hortatory proclamations, perhaps by legislatures, about what sort of people we are or want to be—"We hereby formally and solemnly announce that we are a kind and courageous people." But imagine how such a proclamation would be greeted—how little meaning it would have. If we want to be kind, or if we want to be brave, we have to find places to act in those

20. Aristotle, *Nicomachean Ethics*, *in* THE BASIC WORKS OF ARISTOTLE, *supra* note 1, at bk. I, 1103a30-35.

21. *See id.* at bk. III, 1115a7-1118a19 (further discussion of courage).

22. *See id.*

ways. We also have to be willing to talk and argue about what those virtues mean, what counts as kindness or courage; but mainly we need to find occasions on which to be those things, and to do so as a political community.

And law is one of the few places we act as a community. It is not the only one. There is foreign policy, including war and international relief, although those should perhaps be seen as aspects of law. There are also high profile political processes, including elections and plebiscites; and those too should be seen as occasions for the construction of public character. But law is the primary place where we act not as individuals or as groups within the community, but as or on behalf of the political and legal community itself.

It is worth emphasizing here that CVE does not, however, assume a unified or coherent shared cultural identity. My liberal use of the ambiguous first person plural may give rise to a misunderstanding on this point. I have spoken freely about what "we" want to be as a people, or what matters to "us" as a community. Is it my claim, therefore, that there is out there somewhere some unified and potentially identifiable sense of American character or identity that the law can and ought to articulate? No. Nor do I maintain that all political communities must be in some way meaningful at all—that every political community even *has* a significant character.

On this particular point, my core claim is much more modest, and can if necessary be reduced to two propositions. First, being a member of a given community—being an American, for example—can play a role in at least some people's self-conception. It means *something* to at least some people to say that they are a member of that community. Second, a community's high profile legal rules and institutions can play a role in determining *what* it means. Will those meanings be contested? Absolutely, and all the more so in a large, diverse, and heterogeneous community. Legal institutions can and do play an important role in the formation and articulation of public character primarily because the question of who "we" are is perpetually in dispute, and, again, because there are so few other places where we might be said to speak or act as a community.

It bears noting as well that virtues need not be defined with scientific or philosophical precision in order for them

to be developed and articulated through public action. As with a flag in the distance, it is quite possible to aim at something, even to rally around it, without necessarily being able to see it clearly. We want to be brave, for example, or kind, or wise; and these are likely to be things worth pursuing even though we will never be able to nail them down. A social scientist might reasonably demand precise definitions before attempting to study or quantify the effects of a particular trait. An academic philosopher might reasonably demand that the concept be clarified before it is analyzed. Perhaps that is why social science and academic philosophy have so little to tell us about courage or kindness or wisdom. The law, however, serves not primarily as a vehicle through which we analyze or trace the consequences of clearly-defined notions of courage, kindness, or wisdom, but rather as an arena in which we work through what it means to be brave, kind, or wise.

It may be objected that it is somehow disingenuous for a community to try and enact virtues that it does not really and fully possess. Here, the critical distinction is between hypocrisy and aspiration. This is why action, rather then hortatory pronouncement, is essential. For a community to try and describe itself as brave or kind without making any effort to emulate those traits would indeed be disingenuous and hypocritical. But it is not hypocrisy to try and be better than we are—to try and find occasions on which to embody the things we aspire to be, despite the fact that we often and elsewhere fall short. That is not hypocrisy; it is hope.

VII

To what extent should the sorts of arguments suggested by communitarian virtue ethics be considered *legal* arguments? Put more concretely, how much weight should courts give to these sorts of arguments in deciding cases or interpreting specific legal rules? The answer, I think, is that courts should give the same sort of weight they give to arguments based on normative or utilitarian concerns. In any legal argument, the aim in part is to give sensible effect to relevant authority. Where a statute is intended to achieve specific consequentialist goals, parties talk about whether a proposed interpretation would or would not further those ends. Where a constitutional provision is intended to vindicate or protect a particular right or

principle, parties talk about those rights or principles. Where a common law rule has evolved to accomplish certain ends or vindicate certain principles, courts think about those ends and concerns in deciding how the rule should be applied or further developed. Similarly, where a rule has arguably been enacted or has evolved in an effort to say something about the character or identity of the political community, that too is a legitimate subject of legal argument.

Of course, that does not answer the question of how much weight any particular argument ought to get in any given situation. But nor is it possible to make a blanket statement about the appropriate force or applicability of consequentialist or deontological arguments. Competing legal theories make more or less space for various sorts of concerns. And different kinds of arguments are obviously more or less persuasive in different situations. One of the things lawyers ought to be able to argue about is the force which ought to be given to particular concerns in particular situations.

This is or ought to be nothing new. Consider a recent high profile Supreme Court case, for example. In *Crawford v. Washington*[23] the issue was the appropriate interpretation of the Confrontation Clause of the Sixth Amendment. What does or should it mean to require that criminal defendants be "confronted with the witnesses against them?" In particular, under what circumstances should it be considered a violation of a defendant's confrontation rights when a statement made out of court is used against him at trial without an opportunity for cross-examination? Prior to *Crawford*, that determination turned essentially on the reliability of the statement, albeit approached obliquely and awkwardly through the lens of hearsay law. In *Crawford*, the court decided that if an out of court statement is "testimonial" in nature, use of the statement against a criminal defendant at trial without the opportunity for cross-examination constitutes a Confrontation Clause violation even if the statement is deemed highly reliable.

In the debates surrounding *Crawford*, parties and amici and advocates made a range of arguments. As would be

23. *See* Crawford v. Washington, 541 U.S. 36 (2004).

expected, both sides made arguments about the consequences of adopting one interpretation or another. And, of course, they argued about what interpretation would be most consistent with the text of the Sixth Amendment as elucidated in precedent and the principles and ends it is thought to serve. As did I. In an article published prior to the decision in *Crawford*, I argued that the Confrontation clause ought to be understood as embodying a certain character trait which animated the evolution of the right, which the Framers found compelling, and which arguably has continued to play an important role in the American self-conception.[24] That trait is a form of courage—a willingness to look in the eye of those one would accuse; and a concomitant unwillingess to engage in or abet what we consider the cowardly act of anonymous or hidden accusation. Looking at the history of the confrontation right, both prior to and since the adoption of the Sixth Amendment, I suggested that it has always served the important symbolic function of helping to construct and articulate that aspect of public character and identity. If so, the reliability of a statement should not be central to the inquiry into its admissibility under the Confrontation Clause.

However persuasive or non-persuasive one finds that particular argument in that particular context, the point here is simply that there is no need to see it as fundamentally different from—or somehow less "legal" than— the sorts of arguments that are made in cases every day. In interpreting our Constitution, our statutes, and our common law, we argue about the ends our rules and institutions were enacted to serve, have evolved to serve, or might serve if variously interpreted and applied. This is the bread and butter of the lawyer's work. So, if those ends arguably include the articulation of public character, then arguments about public character are as much "legal arguments"—and as much entitled to be given weight in legal decision-making—as are any other.

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24. *See generally* Clark, *Confrontation Clause, supra* note 15; Clark, *Direct Democracy, supra* note 15; Clark, *Convictions, supra* note 15.

VIII

How do arguments about character fit with other sorts of arguments? CVE does not require or suggest that a conversation about character should *supplant* thinking about either moral principles or the consequences of our conduct. These things are inherently and inevitably interconnected in both individual and public discourse. Character, consequences, and principles are each crucial and necessary ways of talking about and understanding the others. We evaluate our conduct in light of how we understand ourselves. We develop our principles in part with an eye to consequences. We understand ourselves in part both through what we accomplish and through what we stand for. It is, I have said, like a braid; and falls apart without all three strands. If, however, the metaphor is insufficiently precise, I might offer several alternative ways to specify the relationship between these three interconnected strands.

First, it is possible to take the position that character is primary and self-sufficient as an end. On that view, what matters most, and for its own sake, is being the right kind of person. Whether you are "happy" would on this view be beside the point. What you do—whether you do good or harm, whether your actions comply with some set of principles—would be relevant only insofar as that conduct is constitutive or revelatory of your character. This view, although perhaps a plausible reading of some classical virtue ethics, is too strong. It gives insufficient weight to consequentialist and normative concerns, and invites selfishness and egoism.

An alternative will appeal to those most firmly wedded to a consequentialist perspective. On this view, character is instrumental to conduct. Assume for a moment that what we care about is getting people to behave in certain ways—presumably ways which are cooperative, productive, efficient, etc. One way to get people to behave is not merely to give them the right incentives, and not merely to teach them that certain conduct is right or wrong. On Aristotle's

account, the best way to foster good behavior is to teach people to be the sort of people who behave well.[25]

Despite the appeal of this claim, for two reasons I do not rely on the power of character to shape conduct as an essential defense of or element in communitarian virtue ethics. First, the underlying assumption is less certain than it might appear. At some level and under some circumstances, it is certainly right. One reason you do not steal is not just because you fear the consequences of being caught and punished, and not just because you believe stealing to be morally wrong—though both of those probably play some role. To at least some extent, the reason you do not steal is that you do not want to be a thief. The character-based judgment, moreover, does not merely beg the question. It frames it for you. It makes it unnecessary for you every day to remind yourself that it would be dangerous and wrong to take your friend's wallet.

However, a mounting body of social scientific evidence suggests that behavior is primarily determined or well predicted by stable character traits or dispositions. This body of work has been summarized and deployed under the heading of "situational character" in recent work by Hanson and Yosifin.[26] Their basic claim is that human conduct (as well as attitudes) is much more responsive to, and thus manipulable through, circumstances than we are inclined to recognize or acknowledge.[27] It is worth noting, however, that the real victims of Hanson and Yosifin's critique are not character-based theories of human conduct, but rather the numerous versions of the rational actor model which so pervade our legal and political thinking. Put differently, the social science critique of the dispositionist position leaves much more room to believe that people act in response to self-perception and identity, including a sense of community-based expectations, than to the regnant if

25. Aristotle, *Nicomachean Ethics*, *in* THE BASIC WORKS OF ARISTOTLE, *supra* note 1, at bk. I, 1102a8-10 ("[t]he true student of politics . . . is thought to have studied virtue above all things: for he wishes to make his fellow citizens good and obedient to the laws.").

26. *See generally* Jon Hanson & David Yosifin, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2004).

27. *See id.*

implicit assumption that people respond to their evaluation of perceived costs and benefits.

My second and more central reason for not relying on the ability of character to shape conduct in my defense of a character-based approach to law is that to do so would put the cart before the horse. If it is true that what conduces to happiness is being a certain kind of person, rather than getting certain stuff or doing certain things, then what matters about conduct is its ability to shape and inform character, rather than the other way around. I do not want to put character to work in the service of the state. I want to put the state to work facilitating the development of character, and thus human flourishing.

However, in the event that many will not yet be ready to embrace the claim or assumption that character is central to real well-being, I might also offer a weaker but still sufficient way to understand the interrelationship between virtue ethics, consequentialist thinking, and moral first principles. It is to see a character-based conversation as simply providing an excellent and useful framework for thinking about the latter two sorts of concerns. Even if you are convinced that what really matters is either the moral status of one's conduct or the consequences of one's conduct, we need to find ways of encouraging people to think well and fully about those things. Virtue ethics does that. Thinking and talking about what sort of people we want to be is, at the very least, a natural and productive way of thinking and talking about both what we think is right and what we want to accomplish.

To reemphasize, my own claim, and that of the virtue ethics out of which my approach grows, is stronger. Character, on this view, is not just a way of talking about consequences or principles, it is an indispensable part of a how a thoughtful person thinks about life, without which talk of consequences and principles comes unraveled. It is, if the assumptions underlying virtue ethics are correct, the best route to real human thriving. I highlight the possibility of a weaker but still sufficient function simply to suggest that this perspective need not be fully embraced in order to see the value of at least allowing a conversation about character to play a role in public discourse.

IX

What follows? Start with the practice of law, as engaged in daily by lawyers, judges, legislatures, and administrators. Granted that through the law we ought to be willing to think and talk about character, how should the law make space for that? The specific relationship between any given rule or practice or institution and public character or identity will of course depend entirely on the circumstances, and therefore so will the scope of appropriate or applicable argument. At a general level, however, the main implications of CVE for law are twofold, and straightforward.

First, we should be aware of ways in which we may already be instilling traits of character. There are attributes—selfishness, for example, or greed—that we would likely all prefer not to encourage. But we may be doing just that, albeit unintentionally, if we are inattentive to the impact of law and politics on public character. Significantly, this can happen as much through our arguments as through our enactments. By repeatedly and incautiously appealing to self-interest, for example, we are not simply responding to selfishness in society, we are arguably helping to construct and entrench that same trait.[28] We should be cognizant of that possibility, and take responsibility for what it is we teach, as well as what it is we do.

Second, and more essentially, law and politics can and do provide for a definition and description of public character and aspiration. This is the function at the heart of CVE. Law serves the community not just by providing the conditions for material thriving—food, shelter, safety, and the like—but as well by acting as the vehicle through which people construct and articulate the traits of character—the virtues—to which they can then aspire. On this score, what lawyers need to do is to learn to talk and argue well and responsibly about character. What judges and legislatures need to do is to be willing to listen—to recognize that these sorts of arguments may on many circumstances be as important, as legitimate, and as "legal"

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28. *The Character of Persuasion*, *supra* note 17, at 75-76.

as the consequentialist and normative arguments they now hear every day.

And what follows for legal scholarship? One reason law and economics has produced and will continue to produce such a mountain of scholarship is because it poses a virtually limitless number of clearly identified and well-framed problems—problems that promise to yield to the force of analysis and produce satisfying if always tentative answers. The problems posed by communitarian virtue ethics are less clearly framed, and less likely to lead to clear answers; but they are no less numerous or important.

First and foremost, legal scholars ought to think about the connection between law and public character. If legal decision-making ought to be informed by an awareness of the consequences of legal rules and institutions for public character, legal scholarship ought to strive to highlight those potential consequences. For example, I have made an argument of this sort in the context of direct democracy. It has been suggested that the initiative, by providing a rare opportunity for political participation, serves a function of civic education, akin to the jury, or military service.[29] I argued that because of the way in which initiative voting is carried out, and because of the way in which it isolates issues and voters, it may instead entrench a public character of selfishness and irresponsibility.[30] Initiative voting is not at all like jury service or military service, each of which requires both work and confrontation, and thus may teach responsibility and courage. Voting on ballot issues allows one to express desires without confronting consequences, and thus arguably conduces not to "maturation," as has been suggested, but to the opposite. It is the infant, not the mature citizen, who knows how to say "I want" but little or nothing else, and is encouraged to do so as loudly as possible but with no requirement that he or she confront or acknowledge the consequences or implications of those preferences.

Again, my point in citing my own past argument here is not to hold myself out as some sort of exemplar. Like the first models in a new car line, the first arguments in a new

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29. *See, e.g.*, Alan Hirsch, *Direct Democracy and Civic Maturation*, 29 HASTINGS CONST. L.Q. 185, 209-17 (2002).

30. *See generally* Clark, *Direct Democracy*, *supra* note 15.

line of thought are likely to be creaky and full of bugs that need to be worked out over time. So, try not to judge the potential power of the theory by my early efforts to put it to work. I refer to those merely to give an illustration of the sorts of things scholars ought to be willing to think about, in confidence that my colleagues, when they do so, will be better at it than I.

Second, legal academics ought to call upon our colleagues in the social sciences to turn their attention to, and help us think about, the particular ways in which law plays a role in the construction and articulation of community identity. Environmental law scholars for example, should continue to inquire into the social meaning of both environmental regulation and our relationship with nature. In fact, environmental law scholarship has been relatively receptive to the work on the relationship between law and community identity, if not character *per se*, and might in that sense be something of a model for other areas. Much of this work has focused on identifiable cultural subgroups, particularly indigenous communities, but the inquiry has and should continue to be broadened.[31] Those

31. *See* Eugene Bardach & Robert A. Kagan, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 65, 114 (1982). (Studying the impact of regulatory unreasonableness on "cultures of resistance" to environmental laws); Charles F. Wilkinson, THE EAGLE BIRD: MAPPING A NEW WEST 137-38 (1992) ("We need to develop an ethic of place. It is premised on a sense of place, the recognition that our species thrives on the subtle, intangible, but soul-deep mix of landscape, smells, sounds, history, schools, storefront, neighbors, and friends that constitute a place, a homeland. An ethic of place respects equally the people of a region and the land, animals, vegetation, water, and air."); Craig Anthony (Tony) Arnold, *Working Out an Environmental Ethic: Anniversary Lessons from Mono Lake*, 4 WYO. L. REV. 1, 26 (2004) ("The first lesson is that the pursuit of an environmental ethic, or conservation goals, often begins with the ecology and psychology of a place. A particular place in the natural environment—such as Mono Lake—has ecological features and importance that form an initial point of human connectedness to the natural environment."); *see, e.g.*, Eric T. Freyfogle, *The Wildlife Refuge and the Land Community*, 44 NAT. RESOURCES J. 1027, 1040 (2004) ("In the long run, conservation cannot succeed unless American culture shifts to favor it more strongly. Well-run wildlife refuges can foster that cultural change."). *See generally* Bradley A. Harsch, Consumerism and Environmental Policy: Moving past Consumer Culture, 26 ECOLOGY L.Q. 543 (1999); Mark Sagoff, Settling America or the Concept of Place in Environmental Ethics, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 349 (1992); Michael P. Vandenbergh, The Social Meaning of Environmental Command and Control, 20 VA. ENVTL. L.J. 191 (2001); David A. Westbrook, Liberal Environmental Jurisprudence, 27 U.C. DAVIS L. REV. 619 (1994).

writing about gun control should heed the advice of Kahan and Braman and find ways of thinking about the meaning of guns in the American self-conception.[32] Are they tied in people's minds to character traits perceived as admirable—traits such as self-reliance, for example, or fortitude? More generally, legal academics ought to do what lawyers and judges ought to do. We ought to learn to think as well and as fully about character and identity as we now do about principles and consequences.

These will be difficult and messy inquiries, inevitably lacking both the comforting precision of economic analysis and the satisfying heft of quantitative data. But if we are searching for something, we cannot just look where the light is best; we need to look where it really might be.

X

Finally, it may seem as though I have ducked what ought to be the heart of the matter. What sorts of traits of character ought the law to encourage or engender? Alternatively put, what is the source or status of the virtues to which a community might aspire? Are the virtues merely conventional, varying from time to time and place to place—manifestations of what this people or that people happen to find admirable? If so, in what sense can CVE be a theory with any normative force? And why not leave the description of these sorts of cultural tastes to sociology or anthropology? Or, are the virtues somehow eternal and permanent, transcending culture—character traits to which all people everywhere somehow ought to aspire? If so, what is their source? And what is the source of the obligation implicit in the claim that they "ought" to be pursued?

To some extent, it might not matter precisely what virtues we pursue, or what their source is. Striving to be a certain kind of person—focusing on character rather than self-interest—may be valuable for its own sake, regardless of the exact form of character emulated or pursued, at least if the traits thereby developed are not affirmatively harmful or dangerous. How so? Because the effort itself can provide

32. *See, e.g.*, Michael C. Dorf, *Identity Politics and the Second Amendment* 73 FORDHAM L. REV. 549 (2004).

focus and meaning to community life. As experience teaches, happiness is something which if pursued directly will recede indefinitely. Rather, it must be approached indirectly. It comes as a byproduct of being neglected, as a consequence of a life dedicated to something else. Virtue ethics suggests that the best candidate for that "something else" is character. I suggest that this is as true for the polis as for the person.

But we can say more than that. In particular, CVE does provide a way of thinking about the origin and status of the virtues—a way which steers clear of both relativism, according to which the character of a community might be seen as a matter of mere preferences or taste, and absolutism, under which it might be necessary to take the untenable position that all peoples everywhere should pursue the same character traits. Instead, CVE allows us to operate on the assumption that virtues are like other things people build to meet their needs—houses, fences, cathedrals, and the like. Yes, they are constructed by the communities that make use of them; and yes, they vary greatly from place to place and time to time. But no, they are not completely arbitrary.

In that light, the simplest answer to the question of what virtues ought to be pursued is that a community ought to construct and aspire to those traits of character that will both resonate within its own history and culture and that will meet its current and ongoing needs. But we can safely say slightly more than that. There are likely to be patterns—circumstances under which communities will predictably need or benefit from the cultivation of certain traits. The architecture metaphor is apt. Just as people in rainy places need good roofs, and people in cold places need warm houses, communities faced with danger will need and should cultivate courage. Communities faced with want should perhaps honor thrift, or fortitude, or generosity; just as communities faced with prosperity should perhaps guard against greed, gluttony, and materialism. CVE would call upon both social scientists and lawyers to be willing to think in these terms, to be aware, as described above, of both the intended and unintended ways in which law may be constructing and reinforcing traits of character which are either destructive of or valuable to the real well being of the community.

In the end, however, it ought to be possible to say something more even than that—to say something more generally about the sorts of traits worthy of emulation, and why. This endeavor was at the heart of the classical tradition, and in my view remains the central unanswered question of moral and political theory. It should as well be the question in the front of our minds as we live our lives, both as individuals and as members of a community. Was Plato right when he argued that character focused on love of knowledge is the best route to real and lasting well-being? Was Ivan Boesky right when he argued that greed is good? What sort of people should we be? CVE cannot answer this question—no legal theory can. What communitarian virtue ethics does, however, is call upon us to be willing to ask it.